

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
AUTOMOBILE CLUB OF NEW YORK, : Docket #11cv6746
Plaintiff, : 1:11-cv-06746-RKE-HBP
- against - :
THE PORT AUTHORITY OF NEW YORK : New York, New York
AND NEW JERSEY, : June 19, 2012
Defendant. :
----- :

PROCEEDINGS BEFORE
HONORABLE HENRY PITMAN,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: Automobile Club of New York against the
3 Port Authority of New York and New Jersey. Counsel, please
4 state your name for the record.

5 MR. KEVIN MULRY: For plaintiff, AAA, Kevin Mulry
6 and Michael Fitzgerald from Farrell Fritz. With us also is
7 Marta Genovese, counsel at AAA. Good afternoon, Your Honor.

8 HONORABLE HENRY PITMAN (THE COURT): Good
9 afternoon.

10 MS. KATHLEEN MILLER: Good afternoon, Your Honor,
11 Kathy Miller for the Port Authority of New York and New
12 Jersey, and with me is David Kromm and Carlene McIntyre.

13 THE COURT: All right, good afternoon. We're here
14 outstanding resolve the discovery disputes that are raised
15 in the June 15 joint letter that I received from counsel.
16 And I'd like to go through the issues in the order in which
17 they appear in the letter.

18 All right, the first topic is identified as "the
19 Port Authority should be required to respond to the document
20 request by stating whether or not they will be producing all
21 responsive documents." I thought the Port Authority's
22 position, as set forth in the letter, clarified that. And I
23 understand them to be saying - well, let me ask Miss Miller.
24 I understand the Port Authority to be saying that with,
25 except for the exceptions specifically noted in the letter,

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2 that the Port Authority is producing all responsive
3 documents in its possession, custody, or control.

4 MS. MILLER: That's correct, Your Honor. Now, we
5 haven't finished --

6 THE COURT: Right.

7 MS. MILLER: -- you know, we've done this
8 document poll, the email poll. And the other issue that
9 remains outstanding which the Court raised with plaintiff,
10 and I did raise with plaintiff too in our conversation
11 before this letter, and that is with respect to the
12 allocations to the bond fund which has been raised several
13 times, what level of granularity did they want to go to, and
14 I didn't get a response from plaintiffs on that. So I know
15 they don't want the daily receipts from the George
16 Washington Bridge because that's been scoffed at. But the
17 next level, they have been given the annual allocation to
18 the consolidated bond fund, that was exhibit H.

19 The next level of granularity below that, and I
20 have endeavored to pull that on my own, and I'll provide
21 that, would be the monthly allocations. I can provide the
22 monthly allocations. And then that, for some reason,
23 doesn't answer the question, whatever question is in
24 plaintiff's mind, we'll have to come back and discuss
25 further what level granularity they want to go to with

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2 respect to the bond funds.

3 And, again, I think perhaps there's been some lack
4 of understanding of the Port Authority's financial
5 statements which are posted online. I think perhaps I can
6 assist counsel by giving them copies of those schedules that
7 we believe show the allocation, the 10 percent allocation to
8 the general reserve fund, another topic that counsel has
9 raised with us. Those are actually in schedules that are
10 attached to the Port Authority's annual financial statements
11 which are posted online.

12 If it would assist counsel, we'll pull those
13 schedules, copies of those schedules, and we'll give them
14 those schedules and so that they'll have them and they'll
15 know what it is we're saying in particular supports the
16 exhibits to the Fabiano affidavit. And I tried to explain
17 to counsel that the exhibits to the Fabiano affidavit which
18 were submitted in support of our motion to dismiss, in
19 opposition to the preliminary injunction, were documents
20 created to this litigation. They were created, they were
21 extracted from the annual financial statements to show that
22 the interstate transportation network, in fact, loses a
23 significant amount of money. And they were --

24 THE COURT: I'm not trying to cut you off, but I
25 think you may be getting beyond what topic I was addressing.

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2 I'm not trying to cut you off, but I think you've --

3 MS. MILLER: Well, topic 1 covers quite a --

4 THE COURT: -- gone several yards beyond it.

5 MS. MILLER: -- few of the requests, and I can't,
6 as I stand here now and look at perhaps 20 numbers here, I
7 can't remember which ones went to the consolidated bond
8 fund. So I'm trying to address that generally.

9 THE COURT: No, but my understanding is that the
10 issue there was really sort of one as to the completeness of
11 the Port Authority's response. Is that --

12 MR. MULRY: Yes, that's correct.

13 THE COURT: -- the issue you were raising?

14 MR. MULRY: That's correct, Your Honor --

15 THE COURT: And my understanding is, except for
16 the specific exceptions described in the Port Authority's
17 position, the Port Authority is providing all responsive
18 documents in his possession, custody, or control.

19 MR. MULRY: Our understanding --

20 MS. MILLER: Right, and with the exception of
21 going to the level of granularity that plaintiff --

22 THE COURT: Right.

23 MS. MILLER: -- wanted with the consolidated bond
24 reserve fund and the general reserve fund.

25 MR. MULRY: Our understanding based on what's

1
2 said in the letter and what's been said in court is that
3 unless there's a stated objection to one of the responses,
4 the Port Authority is producing all responsive documents
5 within their custody and control.

6 THE COURT: Well, except, I mean, again, except
7 for the last point that Miss Miller raised.

8 MR. MULRY: Right.

9 THE COURT: I mean you're not looking for the
10 daily counts on tolls and things like that.

11 MR. MULRY: The general concern with the first
12 category is that from the document response it's not clear
13 that the Port Authority is saying that it's producing all
14 responsive documents. That's our understanding based on
15 what's been said in letters and in court.

16 THE COURT: Okay.

17 MR. MULRY: Your Honor, if you wanted me to
18 address the consolidated bond fund and the reserve fund now,
19 I can do that or whichever order --

20 THE COURT: I'm not even sure that was really one
21 of the topics raised here, was it?

22 MR. MULRY: Well, there is - towards the end with
23 respect to we anticipate making a motion --

24 THE COURT: Okay. All right.

25 MR. MULRY: With respect to the --

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2 THE COURT: Let's go through the letter in the
3 order set out in the letter.

4 With respect to the litigation hold, I'm not sure,
5 you know, I understand plaintiff's point. I'm not sure
6 there's an issue to be resolved here at this point or if
7 plaintiff is seeking some relief. If plaintiff is seeking
8 some relief, it's not clear to me what that is. So maybe
9 you want to elaborate on that a little bit, Mr. Mulry.

10 MR. MULRY: Your Honor, we don't believe there's
11 an issue immediate. We did want to alert the judge, alert
12 Your Honor to this issue and what we see as a significant
13 concern. If emails are automatically deleted after 120 days
14 and a written litigation hold was not in place until May 25,
15 that would only take you to January of this year 2012. It
16 wouldn't capture anything from 2011 which includes the
17 summertime of 2011 when the toll increase was being proposed
18 and when it was approved in August of 2012.

19 So we raise that as a concern at this point,
20 although I don't believe there's an issue to be presented to
21 the court. It was raised at the last conference, so we
22 wanted you to be aware that we see that as a very
23 significant issue in the case.

24 MS. MILLER: Your Honor, may I respond to that?

25 THE COURT: Okay.

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2 MS. MILLER: I mean I pretty much said it in my
3 letter. In the first place plaintiffs told the court, in
4 open court, that, back on October 6, within a few days after
5 having commenced this lawsuit, that they didn't want any
6 discovery. So there was no reason for the Port Authority to
7 issue a major litigation hold. We spoke verbally to those
8 people in management and budget and finance who were sizing
9 the toll increase and working on it and told them to
10 preserve any documents that they had.

11 It wasn't until Judge Holwell came down with his
12 decision denying their application for preliminary
13 injunction and indicating that he was converting our motion
14 to dismiss to a motion for summary judgment and allowing
15 limited discovery that plaintiff suddenly came forward with
16 57 categories of document requests.

17 But fortuitously, even though there is an
18 automatic delete 120 days after an email is created, the
19 major player, so to speak, in this case, David Sampson, the
20 Chairman, Patrick Foye, the Executive Director, William
21 Baroni, the Deputy Executive Director, Karen Eastman, the
22 Secretary, Michael Fabiano, the Chief Financial Officer,
23 Christopher Ward, the former Executive Director, and their
24 assistants all had litigation holds on their computers for
25 prior matters so that, absent a delete by any of those

1 individuals, there would not be an automatic cleanup on
2 their computers. And that went back to the Greek Church
3 case and that predates this litigation.

5 So we're not really - the major decision-makers at
6 the Port Authority have litigation holds on their computers
7 and anything would have been preserved unless that
8 individual deleted. Now, I can't control --

9 THE COURT: Well, again, I'm not trying to cut
10 you off, but I'm not sure there's anything to be resolved at
11 this point because they're not seeking, the plaintiffs are
12 not seeking any relief at this point with respect to the
13 fact that the litigation hold was not put in place until May
14 25. I mean whether this is an issue down the road is
15 something that should probably be addressed down the road.

16 I mean at this point I'm either, I mean they're
17 not asking me to bless or condemn what the Port Authority
18 has done, and I'm not sure you're asking me to bless or
19 condemn what the Port Authority has done.

20 MS. MILLER: No, but I'm highlighting that for
21 the key players that litigation hold, there was already a
22 litigation hold in place from other cases on their
23 computers.

24 THE COURT: I'm not sure that we need to prolong
25 the discussion though because there's nothing to be decided

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2 in this regard.

3 MS. MILLER: Very well.

4 THE COURT: Okay?

5 MR. MULRY: Your Honor, if I could just address
6 one inaccuracy in the letter, and just now Port Authority
7 counsel was asserting that AAA had told Judge Holwell that
8 we didn't want any discovery. That's not accurate. The
9 question was whether there would be discovery, early
10 discovery with respect to the preliminary injunction
11 application, and the judge - AAA did ask Judge Holwell to
12 rule on the preliminary injunction application without
13 discovery so that it would not be broken up in piecemeal.
14 But if the case going forward --

15 THE COURT: Was there a record before Judge
16 Holwell?

17 MR. MULRY: I don't know that any conferences
18 were described, but in his opinion - and this is at page 14
19 of Judge Holwell's decision - he said, "While the Court
20 offered AAA an opportunity for early discovery in connection
21 with its application for a preliminary injunction, no such
22 offer was extended in connection with the Port Authority's
23 motion," referring to the motion to dismiss which he was
24 converting to a motion for summary judgment.

25 So in the decision itself, Judge Holwell

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2 recognizes that the issue of whether there should be
3 discovery was directed to the application for a preliminary
4 injunction.

5 MS. MILLER: Well, that's true, but there was no
6 caveat issued at the time.

7 THE COURT: I'm not --

8 MS. MILLER: That they --

9 THE COURT: I'm not --

10 MS. MILLER: That they were reserving.

11 THE COURT: I'm still confused about what we're,
12 what issue there is to be resolved with respect to the
13 presence or absence of the litigation hold.

14 MR. MULRY: Judge, from AAA's perspective there's
15 no issue to resolved. I didn't want to let that --

16 THE COURT: I understand. I understand why you
17 said it.

18 MR. MULRY: -- that issue unresponded to.

19 THE COURT: Miss Miller, what'd you want to say?

20 MS. MILLER: Judge, I don't believe that - I was
21 sitting in another courtroom in the Eastern District and
22 participating in that conference by phone, but I'm unaware
23 as to whether that conference was recorded. We would have
24 to inquire. I can tell you that my memory of that
25 conference, that telephone conference was there was no

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2 statement by counsel on the record that they didn't want
3 discovery now but they might want discovery later. There
4 was no such reservation. And, in fact, I have no
5 recollection of they're coming in on the motions saying that
6 the motion shouldn't be decided because they didn't have
7 discovery and they needed discovery.

8 So the push for discovery came following the
9 decision by Judge Holwell at the end of February, and --

10

THE COURT: Well, maybe it's an interesting
11 question as to whether or not counsel's representations
12 concerning discovery, if any such representations were made,
13 have any effect on the legal obligation to put a litigation
14 hold in place is an interesting issue, but that sounds like
15 it may be an issue for another day. At this point no one's
16 asking me to take any action with respect to the presence or
17 absence of a litigation hold, so I don't know that there's -
18 I understand the parties have divergent views as to whether
19 it was necessary here, but I'm not sure if there's anything
20 to decide in that regard.

21

The third topic, the Port Authority's search for
22 responsive documents must include all persons who could
23 reasonably be expected to possess responsive documents,
24 which I think is probably a correct statement as a matter of
25 law. In its response the Port Authority says, "The Port

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2 Authority has requested all of its employees involved in
3 working on sizing the toll increase and ten-year preliminary
4 capital plan to provide all of their documents and emails
5 relating to this work." Mr. Mulry, is it plaintiff's
6 position that that universe is deficient and if so how?

7 MR. MULRY: Judge, this is an issue that we're
8 raising for the court so you're aware of it's a concern that
9 a selected group of individuals have been asked to collect
10 documents and in some cases self-collect documents. We
11 can't - we're not in a position to say that there are other
12 people who have responsive documents that may come out in
13 discovery, but this is an issue we wanted to raise with the
14 court and with Port Authority at this stage so that we're
15 not addressing it hopefully at a later stage in the case.

16 But I don't think there's a question for the
17 court, issue for the court to resolve at this point.

18 THE COURT: No, I mean, look, as I understand the
19 Federal Rules of Civil Procedure, party's obligation is, a
20 party who receives a discovery request has the obligation,
21 if they're not objecting to the request, to produce all
22 documents in its possession, in the party's possession,
23 custody, or control, and concomitant with that is an
24 obligation to search all repositories or locations which
25 could reasonably be expected to have responsive documents.

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2 You know, I suspect the individuals in the toll
3 booth at the George Washington Bridge probably are not
4 someone whose files need to be searched, if they have any
5 files. You know, there are other people higher up in the
6 Port Authority whose files do have to be searched, and I
7 mean at least facially it doesn't appear that there's a
8 deficiency in the size of the circle the Port Authority has
9 drawn for the document search. I mean if you think there's
10 - I mean and maybe you agree, at least at this point
11 facially, at least it appears that the circle's been
12 appropriately drawn.

13 MR. MULRY: At this point we don't have a basis
14 to say it's not been appropriately drawn. But we have a
15 concern that it's --

16 THE COURT: Yeah, well, I mean --

17 MR. MULRY: -- it's a small group.

18 THE COURT: It's the responding party's
19 obligation to draw the circle in the first instance, and if
20 an appropriate repository has not been searched, the party
21 receiving the document request cannot assert as a defense,
22 well, my adversary didn't tell me to search X's files. But
23 I mean, again, it sounds like there's no issue on this
24 matter. I mean, Miss Miller, do you want to add anything?

25 MS. MILLER: No, Your Honor, as I indicated in my

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2 letter though on the 12th, we expanded it beyond those who
3 were working in management and budget and the executive
4 staff to include at counsel's request anybody in media
5 relations. We have three or four people in that category
6 whose computers are being searched also.

7 THE COURT: All right. The next topic, the
8 review of responsive paper and electronic documents
9 including emails should be conducted by attorneys and not be
10 a self-selection by custodians. Again, in the Port
11 Authority's response it says, I think this is the third
12 sentence in the Port Authority's position, "Moreover, with
13 the exception of Karen Eastman, at their request the law
14 department assisted each of these individuals searching
15 their computers." And that is they didn't search, the law
16 department didn't search paper documents, the law department
17 just assisted with the computer search, Miss Miller, is that
18 what that means?

19 MS. MILLER: No, the law department requested any
20 paper files, but in addition the law department is searching
21 not only emails, assisted these individuals searching not
22 only emails but any stored files. If somebody created a
23 file in their computer for toll and fare increase, for
24 instance, any documents stored in that file are also being
25 searched. So it's not just emails. It's any document in

their computer, in their computer files, or any hard copies.

3 THE COURT: But, for example, Mr. Foye - I'm just
4 trying to understand a little bit more what the Port
5 Authority's position is here. With respect to Mr. Foye, for
6 example, were counsel involved in the search of Mr. Foye's
7 paper documents for responsive documents?

8 MS. MILLER: Not counsel, Your Honor, the law
9 department. We had --

10 THE COURT: I think the law department - law
11 department's attorneys, is it not?

12 MS. MILLER: No, it's a paralegal specialist and
13 a technical person employed by the Port Authority --

14 THE COURT: I see.

15 MS. MILLER: -- who had the search terms which I
16 put in my letter, were very, very broad search terms, and
17 the paralegal specialist and the law department's technical
18 services person together went in to the computers and --

19 THE COURT: No, I'm talking about the hard copy
20 files, who made, who reviewed Mr. Foye's hard copy files for
21 his responsive documents?

22 MS. MILLER: None have been reviewed yet. The
23 collection has just been completed of documents. Those will
24 be reviewed by counsel. The size of this collection was
25 pretty enormous. And the search terms used were fairly

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2 broad. So we've now pulled in fares and tolls from the
3 airports, so we now have collected thousands of documents
4 and we have to go through those and cull them down. But
5 we'll probably have some paralegals working on this as well
6 as attorneys, Your Honor, because we don't have enough staff
7 to staff several thousand documents with attorneys.

8 THE COURT: Mr. Mulry, is there - I'm not aware
9 of any legal authority that says counsel needs to be
10 involved in the initial selection of documents to be
11 produced. Counsel certainly has an obligation to explain to
12 his or her client what a Rule 34 request means and what
13 obligations a Rule 34 request gives rise to, but I don't
14 know - certainly, there's nothing wrong with counsel going
15 out and asking to look through the client's file cabinets or
16 look through the computer itself, but I'm not aware of any
17 legal authority that says that's what counsel must do.

18 MR. MULRY: Well, the --

19 THE COURT: What seems to be what you're
20 advocating in the AAA's position.

21 MR. MULRY: The Pension Committee case does say
22 that one may not place total reliance on an employee to
23 search and select what the employee believes to be
24 responsive without any supervision from counsel. Because
25 someone who is not counsel and understanding the case and

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2 the obligations may not know what to search for, what is the
3 scope of relevant documents. And that's the concern we
4 have, particularly with respect to the high level people who
5 from the Port Authority letter it seems were doing a self-
6 selection of documents, and then documents were placed to a
7 secure link.

8

Now, the Port Authority response in this letter
9 indicates that the law department assisted. It's clear what
10 that assistance is, and it's apparently not attorneys. So
11 the concern we had in putting these issues before the Port
12 Authority and the court was in making sure that it's clear
13 that what the Port Authority is doing in collection of
14 documents should comport with the obligation and that it
15 would not be sufficient for the Port Authority employees to
16 simply look through their files and decide what is and is
17 not relevant.

18

THE COURT: Well, what do you believe has to be
19 done?

20

MR. MULRY: Well, the attorneys --

21

THE COURT: That's, at least in my experience in
22 practice, that that - it was not uncommon for the attorney
23 to either speak with the client or to draft written
24 instructions to the client telling the client what needed to
25 be produced, but it was the exceptional case where counsel

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2 in the first instance went out and looked through the file
3 cabinet.

4 MR. MULRY: Well, here what was reported was it
5 seemed as if employees were being asked to decide what it is
6 relevant based on a description of the document requests.

7 The --

8 THE COURT: Well, if that's - even if that's -
9 well, were they being asked to decide what was relevant or
10 were they being asked to retrieve certain categories of
11 documents?

12 MR. MULRY: Well, that's unclear. Part of what
13 we were doing here, given where we are in discovery, is
14 laying out issues - and just so you understand the context
15 of the letter, based on Miss Miller's schedule, we didn't -
16 she was not available to meet and confer until the 13th. I
17 was unfortunately unavailable that day. So we met and
18 conferred --

19 THE COURT: The letter is very helpful. I've got
20 no negative comments about the letter. I found the letter
21 very helpful.

22 MR. MULRY: Well, just so you're aware that the
23 letter was essentially drafted Thursday night to Friday, so
24 the Port Authority positions - this is not a letter where
25 both sides were hashing out what the various positions were.

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2 You have our position and then the Port Authority position
3 which we saw for the first time late Friday, and then it was
4 simply filed.

5 So one thing we wanted to do, in this letter,
6 raise the issues we saw based on the representations that
7 had been made so far and what had been given to us in the
8 responses. So some of the responses we've received from the
9 Port Authority in this letter may address some of the
10 issues, but we're not doing the production. They're doing
11 that.

12 I think a big goal with a lot of these categories
13 is to make sure that the parties and the court are aware of
14 what has to happen going forward so that we're not six weeks
15 down the road having discovery motions.

16 MS. MILLER: Your Honor, may I respond?

17 THE COURT: Go ahead.

18 MS. MILLER: As I said in my letter of June 8 to
19 Mr. Mulry, we have gone well beyond what we think would be
20 required. We've expanded the universe of people whose
21 computers are being searched. The individuals who were
22 asked to connect to a link and provide the documents
23 according to the search terms that I gave them, and as I
24 told this court, and they're in my letter of June 8, they're
25 very broad search terms - tolls, fares, you know, toll

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2 increases, extremely broad search terms. These would bring
3 in anything connected to that, including anything related to
4 the consolidated bonds or - it's going to bring in thousands
5 of pages because they're such broad terms.

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But I selected these terms. I worked with the
7 paralegal specialist and the technical service person who
8 was setting up the links. As it turned out, most of those
9 people who had exempt computers - and when I say exempt, our
10 technical service is not authorized to go into their
11 computers because of security reasons. We're talking about
12 the executive director, the deputy executive director,
13 people at that level. Those people reached out to us and
14 said, no, come and help us, do the link and unload the
15 documents. With the exception of Karen Eastman, virtually
16 everybody in that category has had our paralegal specialist
17 and our technical service person going to their computers to
18 download the documents.

19

And I've been supervising, to the extent I can,
20 Your Honor, I'm not a technical person. I really can't tell
21 them how to do this. You know, I can just explain to them
22 the universe of documents we're looking for and that we want
23 to get a greater universe and then we'll cull out from that
24 universe what's related to this action and produce it. So
25 it's not like we started narrow. We started extremely

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2 broad.

3 THE COURT: To the extent that this subject
4 matter needs a ruling, I don't think that counsel needs to
5 be involved at the initial search of the repositories, needs
6 to physically conduct a search of the paper files or needs
7 to physically conduct the search of the computers. I mean
8 it is incumbent upon counsel to ensure that the client
9 understands what responsive documents needs to be produced,
10 and if counsel fails to do so, the client may pay the price.
11 But to the - it does - I mean it does not sound - it does
12 not sound like there's a basis at this time for an order to
13 the Port Authority to have greater involvement by counsel
14 with respect to the collection of documents.

15 All right, the next item is the Port Authority
16 should be required to search the emails of commissioners,
17 and, again, I mean it sounds like the commissioners' emails
18 are being searched.

19 MR. MULRY: Yes, I believe it seems that the
20 commissioners are searching their own emails. With respect
21 to that, sort of following in Your Honor's ruling, one thing
22 AAA should be advised which commissioners' emails have been
23 searched and which have not so that we can determine if
24 subpoenas would be necessary, and at that point we would
25 want to know if the Port Authority would be accepting

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2 subpoenas on behalf of the commissioners and representing
3 them.

4 THE COURT: Let me ask you --

5 MS. MILLER: We'd be --

6 THE COURT: Let me ask you a question, then I'll
7 hear anything you want to tell me. Is there any objection
8 to advising plaintiffs which commissioners' emails are being
9 searched and from which responsive documents are being
10 produced?

11 MS. MILLER: Most of the commissioners are
12 searching their own, Your Honor. In one or two cases, I
13 know of one case where the commissioner invited the Port
14 Authority paralegal specialist and our law department
15 technical services person to go and download documents from
16 his computer. That's Commissioner Lindford. I don't know
17 if that was done in any other cases or whether the
18 commissioners, and, again, these are their private
19 computers. They're in their own homes or their own offices.
20 They're not Port Authority computers, and the commissioners,
21 with the exception of David Sampson, do not have Port
22 Authority email.

23 So we will either have a certificate from them if
24 they have no emails or documents on their computer, that
25 they have nothing, or we'll provide whatever documents that

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2 particular commissioner has provided to us and indicate
3 which commissioner those documents came from.
4 THE COURT: All right, it sounded like what Mr.
5 Mulry was seeking was either confirmation that emails are
6 being produced from all, responsive emails are being
7 produced from all commissioners' computers or identification
8 of any commissioners who have refused to have their
9 computers searched. Am I understanding you correctly, Mr.
10 Mulry?

11 MR. MULRY: Yes, we want to know what is being
12 searched, what is not being searched.

13 THE COURT: He just wants to know whether or not
14 you're capturing the emails of all the commissioners or some
15 commissioners --

16 MS. MILLER: As far as I know --

17 THE COURT: -- who are not cooperating.

18 MS. MILLER: As far as I know, Your Honor,
19 everyone is cooperating. We haven't heard from anyone who
20 said they wouldn't do the search. I believe we are getting
21 certificates from several of the commissioners who say they
22 have nothing on their computer.

23 THE COURT: All right. Well, when you complete
24 the production, is there any objection to either confirming
25 that all commissioners' computers have been searched or

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2 identifying the commissioners whose computers have not been
3 searched? Any objection to doing that?

4 MS. MILLER: I don't have any objection to doing
5 that as long as the court understands the computers were
6 searched by the commissioners or their staff at their
7 business. We didn't go in and do the search. We provided a
8 link to the commissioners to give us any documents.

9 THE COURT: Yeah, I understand, but I'm presuming
10 the commissioners wouldn't dissemble to the Port Authority's
11 law department.

12 MR. MULRY: And, Your Honor, presumably the
13 commissioners will be searching for hard copies as well I
14 would expect.

15 THE COURT: Is that - are the commissioners also
16 searching for hard copy, Miss Miller?

17 MS. MILLER: It's my understanding they were
18 asked to provide, those who had files, but I don't believe
19 anybody has provided any. Again, I can't say for certain,
20 but I don't believe anybody has provided any hard copy
21 files.

22 THE COURT: Well, I mean, again, this is not -
23 what I think Mr. Mulry is looking for is he's just looking,
24 he's seeking to make sure that the commissioners' paper and
25 electronic files have been reviewed for responsive documents

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2 and that responsive, non-privileged documents have been
3 produced. I mean it sounds like if some commissioner has
4 been reluctant or unwilling to cooperate with the law
5 department, he's willing to serve a subpoena on the
6 commissioner, but he's just trying to find out whether or
7 not that task needs to be done, which seems to me to be a
8 fair question.

9 MS. MILLER: Yes, Your Honor, I would be happy to
10 let him know. As far as I know, everybody has been very
11 cooperative.

12 THE COURT: Okay. All right. The Port Authority
13 should be required to state if a search for responsive
14 documents was conducted when it responds that there are not
15 responsive documents. I think that's implicit and probably
16 required under Rule 26. Isn't there a requirement about
17 what it means when you've sign a discovery response? Hold
18 on one second, let me just find the provision.

19 (pause in proceeding)

20 THE COURT: 26(g)(1), "Every disclosure under
21 26(a)(1) or (a)(3) and every discovery request, response, or
22 objection must be signed by at least one attorney of record
23 in the attorney's own name or by the party personally if
24 unrepresented and must state the signer's address, email
25 address, and telephone number. By signing it, an attorney

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2 or party certifies that to the best of the person's
3 knowledge, information, and belief formed after reasonable
4 inquiry, (b) with respect to a discovery request, response,
5 or objection, it is consistent with the rules and warranted
6 by existing law or by a non-frivolous argument or extending
7 or modifying or reversing existing law or for establishing
8 new law, (2) not interposed for any improper purpose such as
9 to harass, cause unnecessary delay or needlessly increase
10 the cost of litigation, and (3) neither unreasonably nor
11 unduly burdensome or expensive considering the needs of the
12 case, prior discovery in the case, and the amount in
13 controversy and the importance of the issues at stake in the
14 action."

15

I would think the "after reasonable inquiry" language would require that counsel perform, counsel make reasonable inquiry before confirming that there are no such documents.

19

MR. MULRY: Yes, Your Honor, based on what's been said here and in the letters, our understanding is that when the Port Authority says there are no documents, they're saying that a search was conducted and that there are no responsive documents.

24

THE COURT: Well, yeah --

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MS. MILLER: That's not quite correct, Your

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2 Honor.

3 THE COURT: Pardon?

4 MS. MILLER: That's not quite correct. I did
5 make a reasonable inquiry. As I told the court the last
6 time I was here, I assembled a large number of people in a
7 conference room that was not only Mike Fabiano but everybody
8 who worked with him on putting together the papers, his
9 affidavit and the exhibits, who extracted the information
10 about the interstate transportation network. I had all
11 those people gathered in a room, and we went through each
12 and every document request.

13 And it was explained to me as I've tried to
14 explain to the court, perhaps not too clearly, tried to
15 explain to counsel that the Port Authority keeps its
16 financials and keeps its actual finances, they are pooled.
17 The consolidated bond fund is pooled, our revenues are
18 pooled. We are a pooled agency by statute. So a number of
19 the documents that plaintiff is requesting don't exist.
20 There are none because that's not how we keep our records.
21 And, therefore, I didn't make a search for records when
22 somebody told me you're not going to find any such records
23 because that's not how we keep our financials. I didn't
24 then say, well, make a search for them anyway.

25 So my inquiry was are there such records? If

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2 there are potentially records, then I asked them to make a
3 search. If they told me the Port Authority does not keep
4 those kind of records because of the nature of the agency,
5 then I did not ask them to make a search, and I simply
6 responded there are none. And there were a number of
7 requests that were for, specifically for documents related
8 to the interstate transportation network, and we don't have
9 those documents other than the exhibits to the affidavit of
10 Michael Fabiano that was submitted in support of our motion
11 to dismiss and in opposition to the application for a
12 preliminary injunction.

13

THE COURT: Well, let me come back to Mr. Mulry
for a minute. Mr. Mulry, suppose in some circumstances an
actual search need not be produced as long as there's a
reasonable inquiry, as the rule requires. I mean, if, you
know, to take a simple example, if by the nature of the
request the responding party knows that it doesn't have
responsive documents, I'm not sure that a search actually
needs to be done.

21

If, for example, you know, I'm assuming, and maybe
rightly or wrongly, that Miss Miller has never intended a
Super Bowl, and I mean if you served a document request
asking for all documents concerning Miss Miller's attendance
at Super Bowl X, I mean I'm not sure - and, again, assuming

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2 Miss Miller knows she's never attended the Super Bowl, I'm
3 not sure someone needs to go out and search for responsive
4 documents.

5 MR. MULRY: I think that's correct, Your Honor.

6 It depends on the circumstances.

7 THE COURT: Yeah.

8 MR. MULRY: Here, the statement that there are
9 not documents was stated for a number of the requests, and
10 as I understand the argument, the argument is that you have
11 the bridges and tunnels, you have the Port Authority, I'm
12 sorry, you have the airports, you have the World Trade
13 Center, those various lines of business. Because all the
14 records are consolidated, my understanding is that there are
15 no records or there are few records for the ITN, which
16 creates a significant problem where Second Circuit law is
17 that the ITN revenues can only be used for ITN expenses.

18 So what many of the discovery requests are
19 directed to is the issue of how do you account for the money
20 that comes into the ITN and then the money that goes out?
21 Where does the money that go out go and is it going outside
22 the ITN? And not to get too afield from the topic we're on,
23 but that's why the reserve funds are so important. There's
24 a general reserve fund which has a requirement of 10 percent
25 of the outstanding bonds to be put in that reserve fund;

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2 then there's also a consolidated bond reserve fund that has
3 monies from all parts of the Port Authority going into it.
4 And we know, for example, in three years, in a three-year
5 period in the late 2008/2009/2010, approximately a billion
6 dollars from those went out of the bond fund for various
7 capital expenditures, which from the public records it
8 appears that some significant portion of that went to the
9 World Trade Center.

10

Well, where does that money come from? The World
Trade Center is not making money, not bringing money into
the consolidated funds since 2001. Is it the Port
Authority's position that all of those funds are coming from
the airports? Because we know from the public records that
the bulk of the revenues for the Port Authority on a whole
come from bridges and tunnels on the one hand and airports
on the other. So that goes to the issue that we're seeking
discovery on of funds from the ITN going into these reserve
funds over the years and then at a certain point monies
taken out for capital expenditures, including expenditures
outside the ITN.

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And from the discovery responses the Port
Authority has no control, no check on what's the ITN money
going into the reserve funds and what's the ITN money coming
out. And that, you know --

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2 THE COURT: Well, maybe, maybe not. I mean there
3 are limitations inherent in document requests. The response
4 there are none may be entirely accurate, but the documents
5 may exist in another form or maybe the existence of checks
6 and controls is something that's better explored in
7 deposition. I mean, look, what inference is drawn from the
8 discovery response is I suppose a function who's drawing the
9 inference, but -

10

I guess the issue here is whether or not there's a
11 good faith basis, after reasonable inquiry, for the response
12 there are none. And I mean if you have questions about the
13 correctness of a response, there are none, you know, I think
14 there are two alternatives open to you. You can call Miss
15 Miller and see if, and, you know, have a meet and confer
16 over the telephone, or, alternatively, in terms of tracing
17 the ITN funds in the manner you've just described, you can
18 explore that at a deposition.

19

MR. MULRY: And we have noticed the deposition of
20 Rosemary Chercolo who's been identified as someone within
21 Mr. Fabiano's group at the Port Authority --

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MS. MILLER: Well, I was told --

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MR. MULRY: -- from among other things, that
24 purpose.

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MS. MILLER: Miss Chericolo is being sought to

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2 find out whether there are any additional documents.

3 Obviously, Mike Fabiano, who did the affidavit in support of
4 the motion to dismiss, would be the person to depose as to
5 where the funds come in and where the funds come out. But
6 does the Port Authority know where the funds come from and
7 where they do? Absolutely. Of course, we do. Mike Fabiano
8 could not have created his affidavit if he didn't know where
9 the monies came into the interstate transportation network
10 and where they went out.

11

And a significant portion of them go out to the
12 PATH train but also a significant portion will be going out
13 for the capital plan which requires, as this court knows,
14 you know, the replacement of the suspenders on the George
15 Washington Bridge, raising the Bayonne Bridge, rebuilding
16 the Pulaski Skyway. There are a number of major capital
17 projects in the interstate transportation network, and we
18 know where those fund go. We know where the bonds are
19 because those are the only tax-free bonds.

20

So because we consolidate our monies doesn't mean
21 we don't know where the monies go. We do know where the
22 monies go.

23

THE COURT: Okay. I think we may be getting into
24 - I'm not sure that really addresses the discovery issue
25 here, but I mean that's more of a substantive contention

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2 than a discovery issue. I mean, you know what, what
3 sometimes happens, Mr. Mulry, is, in many litigations, is
4 that a party will serve an initial discovery request, get
5 some documents, wonder why there aren't other documents,
6 take a deposition of a witness or two, and get a better
7 understanding of what classes of documents the adversary has
8 that may be relevant and then serve a second round of
9 document requests.

10 MR. MULRY: Yes, Your Honor, that's what --

11 THE COURT: I mean it's --

12 MR. MULRY: -- we're anticipating.

13 THE COURT: -- not unusual for things to happen
14 that way.

15 MR. MULRY: Yes. Your Honor, there was one topic
16 that we would skip, just to make you aware of. It does not
17 have two different positions. Just to advise the court --

18 THE COURT: The email search terms?

19 MR. MULRY: Yeah, the Port Authority was going to
20 advise us of the search capability of their system, because
21 we agree, the search terms that were in Miss Miller's letter
22 are very broad, and if the search can be done with two
23 terms, with an "and" or within 20 words, that may be more
24 streamline. We also this - this gets to an issue we started
25 to talk about a little earlier. We, for example, believe

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2 the search terms should include search terms related to the
3 consolidated bond reserve fund and the general reserve fund
4 because those are important issues with respect to where
5 does the ITN money go and how is it accounted for.

6

MS. MILLER: Really, we wanted to do a broad
7 search, Your Honor, to avoid repetitious searches, and we'd
8 rather cull through the documents that we have and eliminate
9 those pretty quickly that relate to the airports and other
10 facilities.

11

But I am told, and, again, I haven't spoken to the
12 technical person, but I spoke to the paralegal specialist
13 working with him, that because the search terms that I put
14 in were so broad, that if consolidated bond would come up in
15 connection with tolls, I mean if I put in tolls, fares,
16 interstate transportation network, anything that related to
17 consolidated bonds or the general reserve fund would be
18 pulled up in that search because it's an overly broad
19 search.

20

So rather than go back and do a second search at
21 this time and risk being criticized for not having pulled in
22 enough documents, we're pulling in all the documents, and
23 we'll go through them. So that consolidated bond and
24 reserve fund would have been pulled in if it was any way
25 connected to tolls, that's what I'm told.

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2 THE COURT: Go ahead.

3 MR. MULRY: I don't think that we would agree
4 that necessarily all documents related to the bond fund
5 would necessarily be captured in a search that asks for
6 tolls and fares, but that's why we would want some input
7 into the issue of --

8 MS. MILLER: Well, that's correct, but we don't -

9 -

10 MR. MULRY: -- search terms.

11 THE COURT: I'm looking at your - I think it's
12 your letter, Miss Miller, it's exhibit B. It is your
13 letter. Your letter dated June 8, 2012, page 3, the search
14 terms suggested are as follows: toll, fare, toll increase,
15 toll increase, fare increase, toll hike, etc. And among
16 those terms, consolidated bond fund and reserve fund does
17 not appear --

18 MS. MILLER: No, it does not appear, Your Honor,
19 but I'm told it would come up.

20 THE COURT: But I'm not sure someone can tell you
21 with certainty that those terms are going to retrieve
22 documents with those two expressions in them.

23 MS. MILLER: You know, I made a preliminary
24 inquiry, and I was told that if consolidated bond or general
25 reserve fund, in connection with toll or fare or the

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2 interstate network was a topic, that it would come up. But
3 if we put in consolidated bond reserve fund and general
4 reserve fund, we're going to pull in thousands and thousands
5 of documents because we're going to pull in every other
6 facility for which we issued bonds, which is what we do on a
7 regular basis, Your Honor. So we're talking thousands and
8 thousands of documents.

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I can inquire further, but I was told that it

would be pulled up.

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THE COURT: Well, what you may want to do, and I

say this by way of suggestion not by way of direction, is

that with e-discovery usually the bulk of the expense is not incurred doing the electronic search itself. The bulk of the expense is the attorney time that occurs or that is expended later when the documents are reviewed for, or manually reviewed by a warm body for responsiveness and privilege, that the electronic search itself is usually not a terribly expensive undertaking.

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What you may want to do, and again, I say this by

way of suggestion, not by of an order, but what you may want to do is when you do the electronic search, do the search including the electronic term search, consolidated bond fund and general reserve fund I think were the two terms that Mr. Mulry mentioned, and maybe just segregate the results.

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2 Don't search it manually, save yourself that expense, and
3 see if the plaintiffs are happy with the response they get
4 to the other terms. And this way if we need to litigate
5 about the general bond fund, the search terms consolidated
6 bond fund or general reserve fund, at least the electronic
7 documents will have already been culled, will already been
8 set aside. But don't do the manual review yet. Do you
9 understand what I'm - I'm not terribly sophisticated when it
10 comes to e-discovery terms, so maybe I'm not communicating
11 effectively. I hope I am. Do you understand what I'm
12 suggesting?

13

MS. MILLER: I do, but I would ask that the
court, if we're going to do something like that, we should
do consolidated bond fund and toll, because otherwise we're
going to pull in everything. Everything. I mean we really
are going to have --

18

THE COURT: That's a fair point. That's a fair
point.

20

MS. MILLER: For the - and this would be for Port
Authority computers only, correct? You're not asking us to
go back to the commissioners?

23

THE COURT: Well, the discovery obligation
extends to documents in the party's possession, custody, or
control. So it's a question of what is in the Port

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2 Authority's possession, custody, or control.

3 MS. MILLER: Well, technically we don't control
4 the commissioner's private computers. I mean --

5 THE COURT: Well, if --

6 MS. MILLER: We've asked --

7 THE COURT: -- their private computers are not
8 within your possession, custody, or control, the search
9 obligation doesn't extend to them.

10 MS. MILLER: Right, but we have, in this
11 litigation we have gone the extra mile and asked them to do
12 the search on all the search terms that were indicated in my
13 letter.

14 THE COURT: But I mean it does sound like the
15 search terms you have on page 3 of your June 8 letter are
16 going to yield a wealth of documents that the plaintiffs
17 will find of interest. So it may be that you'll never have
18 to, we'll never have to cross the bridge about consolidated
19 bond fund or general reserve fund. My understanding is it's
20 not an expensive undertaking to run the electronic search
21 and segregate the product of specific search terms. But,
22 again, I say that by way of suggestion not by of order.

23 All right. The next topic is privilege, and it
24 looks like the response is that no privileges have been
25 asserted.

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2 MR. MULRY: That is the response.

3 THE COURT: All right, so there's nothing to
4 fight about there. The next topic I'm a little at sea at.
5 The Port Authority should be required to advise of any
6 repositories that may have responsive documents that have
7 not been searched and the reason why. I mean, Mr. Mulry, in
8 any organization there's always a chance of things being
9 misfiled. You know, if there's a reasonable prospect that a
10 repository has responsive documents, it's got to be
11 searched. I'm not sure what you're looking for here.

12

MR. MULRY: This goes primarily to one of the
13 issues we discussed at the last conference. If, for
14 example, there are backup tapes that under Rule 26 arguably
15 would be not reasonably accessible, we are entitled to know
16 that the Port Authority has those and they're not being
17 searched, and we can discuss whether or not that becomes an
18 issue. Where this is especially of concern is if the
19 representation is that after 120 days emails on the Port
20 Authority system are deleted and then, as I understand it,
21 are not retrievable again, we want to know if that is, in
22 fact, if that's correct or if there are backup tapes that
23 exist such that those can be recreated and there may be an
24 issue under Rule 26 of whether those should be searched or
25 under what conditions. But it's primarily understanding are

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2 there repositories, particularly with respect to electronic
3 information, that have not been searched for some reason
4 such as their backup tapes --

5 THE COURT: So you're only look for
6 identification of repositories that haven't been searched
7 because defendant is taking a position that they're
8 reasonably accessible?

9 MR. MULRY: Yes, or for some other reason. Not
10 really the issue of something's been misfiled so there may
11 be a file cabinet out there where something was placed. It
12 is of particular concern with the issue of emails that are
13 automatically deleted. Is it correct that those --

14 THE COURT: I mean I'm just trying to get, trying
15 to get some focus here. Are you looking for repositories
16 that fall within Rule 26(b)(2)(b)?

17 MR. MULRY: Primarily --

18 THE COURT: (b)(2)(b) reads "specific limitations
19 on electronically stored information. A party need not
20 provide discovery of electronically stored information from
21 sources that the party identifies as not reasonably
22 accessible because of undue burden or cost."

23 MR. MULRY: Yes, that's --

24 THE COURT: Is that what you're looking for?

25 MR. MULRY: That's the primary basis for this

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2 section.

3 THE COURT: All right. Are there any such
4 repositories, Miss Miller? And understand he's not seeking
5 to compel discovery of those repositories right now. He's
6 just seeking identification of any such repositories if they
7 exist.

8 MS. MILLER: It's my understanding, Your Honor,
9 and I've made reasonable inquiry, but I can always make
10 further reasonable inquiry, that emails that are deleted
11 after 120 days are not recoverable, that they are not backed
12 up. That backup is for saved files.

13 THE COURT: All right. Does the Port Authority
14 have backup tapes?

15 MS. MILLER: The Port Authority has backup, but
16 it's my understanding that it's for saved files. If I
17 create a litigation document and I save it in my computer in
18 the share drive, and my computer is destroyed, it's my
19 understanding that that document has been saved on backup
20 tapes because I intended to save it.

21 THE COURT: Okay.

22 MS. MILLER: So if I took an email out of the
23 regular email system and I saved that email in a folder, in
24 the share drive, I have a share drive as well as a U drive
25 on computer and I put it in the share drive and I saved it

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2 as a document, that that email would be preserved, that it
3 would be backed up because I've now saved it as a regular
4 document just as a Word document. That's my understanding,
5 but I'm not a technical person, and I don't know how long
6 those backup tapes are maintained. My only experience with
7 it directly was after 9/11 when I was fortunate enough to
8 have most of my files saved on backup.

9

THE COURT: All right, well, I mean with respect
10 to this item, what I'm inclined to do is direct - I'm not
11 trying to put you on the spot here, Miss Miller, or ask you
12 to describe things that you don't have a full understanding
13 of. But what I'm inclined to do is direct the Port
14 Authority to describe to plaintiffs what backup tapes exist
15 and what information they capture.

16

Again, I hasten to add that I'm not ordering that
17 backup tapes be searched or restored at this time. That's
18 an issue that involves a different analysis, and that's an
19 issue that if we come to that issue, if we come to that
20 matter, it would need to be briefed, but he's at least
21 entitled to know what exists and what kind of information is
22 captured on the backup tapes. Okay?

23

The Port Authority should not be permitted to
24 redact non-privileged information from documents. Mr.
25 Mulry, why are they not permitted to redact irrelevant

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2 information?

3 MR. MULRY: Well, Your Honor, they're entitled to
4 withhold or redact information on the basis of privilege,
5 but as far as selecting information that they consider not
6 relevant --

7 THE COURT: Let me pose the question differently.

8 What entitles you to discovery of irrelevant information?

9 MR. MULRY: Well, if it is a document that's
10 relevant to the case --

11 THE COURT: Well, sometimes part of a document's
12 relevant and part of it's not.

13 MR. MULRY: But if a document's relevant, the
14 only basis for redaction is privilege.

15 THE COURT: No, if a document deals with multiple
16 topics and some topics are relevant and some topics are
17 irrelevant, what entitles you to discovery of the irrelevant
18 topics?

19 MR. MULRY: Well, the - Your Honor, we've looked
20 as far as finding authority for redaction of documents on
21 the basis of relevance, and that is nothing I have found any
22 authority for. Typically --

23 THE COURT: No, but I think the answer may lie in
24 Rule 26 which sets the general guidelines for discovery as
25 being relevance and non - relevant to a claim or defense and

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2 not privileged.

3 MR. MULRY: Well, then if Port Authority is
4 entitled to redact information that they consider not
5 relevant, then we would have to have a log of all those
6 redactions --

7 THE COURT: By what authority?

8 MR. MULRY: So we would understand what's the
9 basis for a redaction --

10 THE COURT: No, what requires a log of redactions
11 on the grounds of irrelevance? The rules don't.

12 MR. MULRY: How are we to know why a document is
13 redacted? Is it redacted on the basis of privilege?

14 THE COURT: You could ask. I mean right now we
15 know they haven't redacted any - well, my understanding is
16 they haven't asserted the privilege with respect to
17 anything. That was one of the prior topics. But if you -
18 look, if you get a document that's redacted and you want to
19 know why it's redacted, pick up the phone and call Miss
20 Miller. I mean if you ask, she's obligated to tell you at
21 least why it was redacted, whether it was relevance,
22 privilege, or something else.

23 MR. MULRY: Because we have to be able to address
24 that if necessary to the court as to there's a redaction and
25 the reason for, and if we disagree with the redaction, then

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3 THE COURT: Well, I mean --

4 MR. MULRY: -- we'd have to be able to realize
5 that.6 THE COURT: Part of the problem is that there's
7 nothing in the rules that requires a list of documents
8 withheld or redacted on the ground of privilege and carried
9 to its logical extreme, requiring a redaction log, requiring
10 a log of documents redacted on the grounds of irrelevance
11 could lead to the requirement that you got to prepare a list
12 of documents, that a party would need to prepare a list of
13 documents withheld on the grounds of relevance which would
14 mean that a party would need to log every document it hasn't
15 produced.

16 MR. MULRY: No, I wouldn't suggest that.

17 THE COURT: Which is obviously ridiculous.

18 MR. MULRY: The issue is it's a document that is
19 relevant to the case.20 THE COURT: Well, sometimes - but, no, I mean
21 sometimes a document deals with multiple issues, and some of
22 the issues are relevant and some of them are irrelevant. I
23 mean I suppose you could have a document, you know,
24 itinerary for, or agenda for a meeting and one of the topics
25 might be a toll hike, and topic number 10 may be where the

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2 holiday party's going to be this year. And the toll hike
3 topic might be relevant but the topic on where the holiday
4 party's going to be held clearly isn't. I mean sometimes a
5 document deals with multiple issues, some of which are
6 relevant, some of which aren't.

7 MR. MULRY: Your Honor, I would ask that we'd be
8 given the opportunity, if we decide to raise this again to
9 you with case authority, but we'll certainly defer to your -

10 -

11 THE COURT: I'm not aware -

12 MR. MULRY: -- view of the case right now.

13 THE COURT: I'm not aware of anything that
14 requires a log of documents redacted on the grounds of
15 irrelevance. And, again, as I said before, if you get a
16 redacted document and you want to know why it was redacted,
17 you're free to call Miss Miller, and she would have to tell
18 you what the basis for the redaction was, you know, whether
19 it's relevance or privilege or something else. I mean do
20 you want to add anything on that, Miss Miller?

21 MS. MILLER: No, Your Honor, in most cases -
22 there weren't a lot of redactions. Exhibit H comes to mind
23 in the second document production, although I believe there
24 were some in the Rule 26 voluntary disclosure also, and what
25 I did was I redacted - exhibit H had to do with the

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2 allocations from the consolidated bond fund, and I redacted
3 the financial information for aviation, the World Trade
4 Center, port commerce, and I left all of the information in
5 for the interstate transportation network.

6 I didn't redact the terms World Trade Center or
7 aviation so that they could see that I was redacting --

8 THE COURT: Right, right, I understand.

9 MS. MILLER: -- because it was World Trade Center
10 --

11 THE COURT: You left the label but not the
12 content.

13 MS. MILLER: Right, but I believe I also did
14 that, I tried to do that if I could with respect to the rule
15 of voluntary disclosure so that they would see that I was
16 redacting because it wasn't related, it was financial data
17 not unrelated to the interstate transportation network. If
18 I didn't in one case, I'd be happy to explain it.

19 THE COURT: No, that makes - what you're
20 describing makes perfect sense. All right.

21 The last area here is AAA's intention to make a
22 motion to compel with respect to disputed areas of
23 discovery. Basically to revisit the May 7 order. Mr.
24 Mulry, if you want to make a motion arguing that broader
25 discovery is appropriate, I'm happy to consider such a

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2 motion. I would only ask that I would the motion is going
3 to add, is going to be based new or different arguments than
4 were made in May. If it's just a rehash of what was said in
5 May, it's going to get the same result.

6

MR. MULRY: We understand that, Your Honor, and
7 we know that when you made that ruling, you did say you
8 would look - that was an initial ruling based - it was
9 actually at the first conference and there were no discovery
10 requests or responses in front of you. So you had told us
11 at the time you would look at that on a full record. So
12 we're just alerting you to the fact that we will do that.

13

On issues, for example, such as the bond reserve
14 fund and the general reserve fund, because Your Honor made t
15 ruling in the context of a discussion of whether the AAA
16 would get discovery with respect to funding sources for the
17 World Trade Center, and Your Honor's ruling was that we
18 would not get, he would limit it to the ITN. But we had not
19 explored in that conference all the issues that were present
20 in the case.

21

And so we would want to make clear, particularly
22 if, as we go into depositions, as to what the parameters of
23 discovery are, because we argue that they do go beyond that
24 time period, but we would like to lay that out for you in a
25 written motion.

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2 THE COURT: Yeah, that's fine. If you want to
3 make a renewed application for broader discovery, you're
4 free to do so. I'll get your papers, I'll get the Port
5 Authority's response, I'll get your reply, and I'll hear you
6 on it. That's - if you want to make such an application,
7 feel free. Again, as long as you're going to make some new
8 arguments. I just hope you're going to be asserting new
9 arguments and not merely repeating what was said in May.

10

 MR. MULRY: Would Your Honor want to set a
11 schedule or do you want me to set that with Miss Miller and
12 present that?

13

 THE COURT: Well, I mean when do you want to make
14 - when do you want to make it? I'll set a schedule right
15 now; if you want to agree with Miss Miller on a schedule,
16 that's fine too. Whatever way you want to do it.

17

 MR. MULRY: Judge, we'd ask for two weeks to July
18 3.

19

 MS. MILLER: Your Honor, I'm starting a trial on
20 Monday in front of Judge Laura Taylor Swain, as I told this
21 court.

22

 THE COURT: Well, they're not going to be making
23 it until July 3, so you're not going to have anything on
24 Monday. So you don't have to do anything next week.

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 MS. MILLER: Right, well, the week after, the

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2 trial, it's not going to be over in a week. There are four
3 plaintiffs, and it's going to take at least two weeks. So
4 this trial is going to be going into July.

5 THE COURT: Maybe.

6 MS. MILLER: I'm pretty sure it's going into
7 July. I can't see this trial even --

8 THE COURT: Trials usually take less time than
9 you think they're gonna take. You usually get surprised.

10 MS. MILLER: If Judge Swain --

11 THE COURT: What kind of case is it?

12 MS. MILLER: It's a retaliation case.

13 THE COURT: Employment Title 7 retaliation?

14 MS. MILLER: Employment retaliation, there are
15 four separate plaintiffs. So it will take a while because I
16 can tell you right away that Paul Weiss has subpoenaed 25
17 witnesses.

18 THE COURT: I don't even think group they had 25
19 witnesses.

20 MS. MILLER: That, you know, unless they're
21 prepared to cut their list, which they may be, but I don't
22 know if they're going to cut it enough, and there's a
23 holiday in the middle.

24 THE COURT: Well, maybe a holiday at the end, we
25 don't know yet. I'd just be surprised if you have a

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2 retaliation trial that's going to take more than two weeks.
3 Anything's possible, but who knows. Well, okay, so you'll
4 be getting the papers on the 3rd.

5 MS. MILLER: Well, I won't be able to look at the
6 papers until this trial is over, Your Honor, whether that's
7 - you know, I'm sure it's not going to be over before the
8 end of the week of July 6 because I know that the witnesses
9 that they are putting on are going to take up all of June
10 and the beginning of July.

11 THE COURT: It must have been some kind of
12 retaliation.

13 MS. MILLER: Well, Paul Weiss is, if nothing, but
14 thorough. They are putting in everybody.

15 THE COURT: Well --

16 MS. MILLER: I would ask that papers --

17 THE COURT: Tell you what, why don't we do this?
18 Why don't we do two weeks from the conclusion of your trial?
19 Or two weeks from July 3 whichever comes later.

20 MS. MILLER: Two weeks from July 3 is --

21 THE COURT: Two weeks from July 3 is July 17, or
22 two weeks from the conclusion of your trial, whichever comes
23 later. So if your trial ends on the 6th, your response
24 would be due the 20th. If your trial folds, your response
25 would be due the 17th. If your trial ends on the 3rd, your

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2 response would be due the 17th.

3 MS. MILLER: Well, can I ask for either the 17th
4 or the 24th, Your Honor, simply because I'm taking a couple
5 of days off in July that week.

6 THE COURT: Which week are you taking time off?

7 MS. MILLER: I'm taking the 18th, 19th, and 20th.
8 So I would ask that it either be the 17th, which assuming,
9 if Your Honor is correct and the trial is over by July 3,
10 that's two weeks, or July 24.

11 THE COURT: Well, tell you what, why don't - all
12 right, so you're out the 18th through the 20th. I'm happy to
13 accommodate your vacation. Why don't we do this, why don't
14 you send me a letter, you can have your secretary do it or a
15 paralegal do it, just send me a one-sentence letter telling
16 me when the case, when your retaliation case has concluded,
17 and I'll set the date two weeks from that giving you the
18 18th, 19th, and 20th off. Okay?

19 MS. MILLER: Very good, Your Honor, we'll do
20 that.

21 THE COURT: What's the docket number of the case,
22 do you have the docket number of the case before Judge Swain
23 by any chance?

24 MS. MILLER: Well, there are four docket numbers.
25 I can send the Court the docket numbers. I don't have it

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2 with me. It's the first -

3 THE COURT: Do you have one of them? I suspect
4 they're going to be related on the ECF system. Do you have
5 any of the docket numbers?

6 MS. MILLER: No, not off the top of my head. I
7 can tell you that it's Eng v. the Port Authority, Young v.
8 the Port Authority, Chin v. the Port Authority, and Chung v.
9 the Port Authority, and I can call the court with the docket
10 numbers. I can tell you --

11 THE COURT: It's E-N-G is Eng?

12 MS. MILLER: Eng, Christopher Eng.

13 THE COURT: Christopher Eng is enough, I can find
14 it. Okay.

15 MS. MILLER: And they're consolidated for trial.

16 THE COURT: Yeah, I can find it.

17 MS. MILLER: So the four of them. I don't know
18 if they're consolidated, because they're brought as four
19 separate actions, the judge consolidated them for discovery,
20 and then we decided just to consolidate them for trial.

21 THE COURT: Just knowing the lead case is enough.
22 That's all I need to know. All right, so send me a letter
23 when --

24 MS. MILLER: Christian Eng, it's Christian Eng,
25 I'm sorry.

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2 THE COURT: Chris --

3 MS. MILLER: Christian, yes, Christian Eng.

4 THE COURT: Okay. All right, we'll give you two
5 weeks, and if the two weeks bridges the 18th through r 20th,
6 we'll give you the two weeks and three days. Okay? You'll
7 do a reply a week after her opposition?

8 MR. MULRY: Yes, Your Honor.

9 THE COURT: Okay. I think that was everything in
10 the letter.

11 MR. MULRY: One last point was to advise, Your
12 Honor, that the parties anticipate that we will need to seek
13 a modified discovery schedule from Judge Eaton, and at this
14 point I don't know that the Port Authority knows when its
15 supplemental production will be made, but I think both
16 parties would be making that application to Judge Eaton. We
17 can consult with you beforehand as to what schedule we would
18 ask.

19 THE COURT: I'm not sure I'm involved in that in
20 terms of what schedule you want to ask for.

21 MR. MULRY: We can then direct that to Judge
22 Eaton.

23 THE COURT: Yeah, I don't have it for general
24 pre-trial. I don't have it for scheduling. And in terms of
25 what modification you want from Judge Eaton, I think that's

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2 something that's up to all counsel, not up to me. All
3 right? All right, anything else from plaintiff's side we
4 should be considering?

5 MR. MULRY: No, Your Honor.

6 THE COURT: Anything else from defendant's side?

7 MS. MILLER: No, Your Honor, thank you.

8 THE COURT: Okay, thank you all.

9 (Whereupon the matter is adjourned.)

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I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Automobile Club of New York versus The Port Authority of New York and New Jersey, Docket #1:11-cv-06746-RKE-HBP, was prepared using digital electronic transcription equipment and is a true and accurate record of the proceedings.

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Signature_____

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Date: June 27, 2012

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